STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Murphy, Cavanagh and Neff, JJ.

RICKY REED,
Plaintiff- Counter-Defendant-Appellee,

No. 126534

vs.

LINDA SUSAN YACKELL,
Defendant and Cross Defendant,

Court of Appeals
No. 236588

and

BUDDY LEE HADLEY, GERALD MICHAEL HERSKOVITZ and MR. FOOD, INC.
Defendants, Counterplaintiffs,
Cross-Plaintiffs-Appellants.

Wayne Circuit
No. 98-839576 NI
Hon. Wendy Baxter

After remand in
No. 123711

REPLY BRIEF ON APPEAL -- APPELLANTS

ORAL ARGUMENT REQUESTED

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Contents

INDEX OF AUTHORITIES

BASIS OF APPELLATE JURISDICTION

This Court granted leave to appeal on January 13, 2005 (Apx p 105a).

QUESTIONS INVOLVED

I. WAS PLAINTIFF WORKING UNDER A "CONTRACT OF HIRE" WHERE THERE WAS A BARGAINED-FOR EXCHANGE OF PLAINTIFF'S LABOR FOR DEFENDANT'S CASH?

Plaintiff-Appellee says:	NO
Defendants-Appellants say:	YES
The Trial Court said:	NO
The Court of Appeals said:	NO

II. WAS PLAINTIFF AN INDEPENDENT CONTRACTOR IN RELATION TO THE LABOR HE PROVIDED TO DEFENDANT, WHERE

A. PLAINTIFF DID NOT MAINTAIN A SEPARATE DELIVERY BUSINESS,

B. PLAINTIFF DID NOT HOLD HIMSELF OUT TO OR RENDER DELIVERY SERVICE TO THE PUBLIC, AND

C. PLAINTIFF WAS NOT AN "EMPLOYER SUBJECT TO THIS ACT."

Plaintiff-Appellee says:	YES
Defendants-Appellants say:	NO
The Trial Court said:	YES
The Court of Appeals said:	YES

STATEMENT OF FACTS

Defendants incorporate herein the statement of facts in their principal brief.

SUMMARY OF ARGUMENT

The controlling issue presented in this appeal is whether a worker who is paid cash by an employer for common labor on an infrequent basis is the "employee" of the employer, for purposes of the Worker Disability Compensation Act, when the worker is injured in the course and scope of the work for which the worker was paid by the employer.

The worker under these facts, Plaintiff Reed in this case, was an "employee" of Defendant Mr. Food on the date of his injury, because he was a party to a bargained-for exchange in which he was paid in cash for his labor.

A bargained-for exchange of cash for labor is the essence of an employment relationship, *i.e.,* a "contract of hire." A rule that satisfies the language and purpose of the WDCA and of the cases that have interpreted it is as follows:

> There is a "contract of hire" when there is a bargained-for exchange in which the worker receives or expects to receive, and the employer agrees to give, something that has economic value to the worker, outside of the work itself. **Cash in any amount** that is paid as a result of a bargained-for exchange will always meet this criterion because it is the classic form of wages. Some non-cash receipts will also satisfy this criterion of value outside the work, such as where a worker receives something that has value in his or her education and future career.

A secondary issue is whether Plaintiff Reed qualifies as an independent contractor with respect to the services he was providing to Defendant. On that issue, there is no factual basis for a finding that Plaintiff Reed maintained a separate business, or that he held himself out to and rendered service to the public, either for delivery services or for general labor, or was himself an employer as defined in the WDCA.

ARGUMENT

I. PLAINTIFF WAS WORKING UNDER A CONTRACT OF HIRE.

A. The Statutory Definitions.

The relevant statutory language is in two sections. MCL 418.161(1)(l) establishes the threshold requirement of a contract of hire.

"Every person in the service of another, under any contract of hire, express or implied . . .."

MCL 418.161(1)(n) builds upon the definition in subpart (l), and then defines characteristics that will move the worker from the category of "employee" into that of "independent contractor."

> "Every person [1] performing service in the [2] course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person [3] in relation to this service [a] does not maintain a separate business, [b] does not hold himself or herself out to and render service to the public, and [c] is not an employer subject to this act."
> (MCL 418.161(1)(n); bracketed numerals and letters added for reference)

B. The Facts Establish a Bargained Exchange of Money for Labor.

The question raised by these provisions is easily stated: "What facts are necessary to move a worker's relationship with an employer from a mere contract to a "contract of hire"?

The relevant facts of this case are also easily stated.

1. Plaintiff had previously worked full time for Mr. Food.

2. Plaintiff was called back by Mr. Food to work 3 to 5 times in the 5 months between the end of his full time employment (December 1997) and the accident (May 1998).

3. Plaintiff was paid $35 to $40 each time.

4. Plaintiff would not have done the work without being paid.

5. The work Plaintiff performed for Mr. Food was to deliver its products.

6. Plaintiff did not perform delivery services for any other business.

7. Plaintiff did not advertise or promote to anyone his availability to perform for delivery services.

8. Plaintiff did some painting for some relatives.

In his brief, Plaintiff ignores some of the testimony that he himself and his witness Buddy Hadley offered. Thus, at page 14 of his brief, Plaintiff says: "Herskovitz never subsequently consented to having Ricky Reed work as a day laborer." The testimony of Buddy Hadley, a nominal defendant but Plaintiff's friend and witness, was precisely the opposite; he testified that Mr. Herskovitz referred to Ricky when he told Buddy to go get "whatever." Hadley testified: "he [Herskovitz] called Ricky 'Whatever.'" (Apx p 27a, Trial Transcript vol II p 79).

In addition, Ricky Reed himself said that Herskovitz called him back: "I got called in" (Apx p 45a, Trial Transcript vol III, p 102). Apart from the inherent implausibility of the suggestion that that Mr. Herskovitz was hiring someone but did not know whom he was hiring, it is irrelevant. Mr. Herskovitz knew he was hiring someone to do work for him, and the issue of the status of that worker vis à vis the WDCA is unchanged.

Plaintiff also tries to make use of gaps in the evidence. At page 15, for example, Plaintiff says: "There is no evidence that Ricky Reed ever turned anyone down who wanted to hire him as a day laborer." Perhaps true, but there was no evidence that anyone besides Mr. Food ever asked to hire him as a "day laborer," let alone to help with delivery. An unknown number of relatives apparently asked or permitted him to do some painting, but that and the work for Mr. Food is all there was. There is no evidence of Plaintiff taking an active role either as a purveyor of delivery services in particular or of day labor in general.

Although Plaintiff's brief is not entirely clear on this point, Plaintiff appears to accept the fact that the "contract of hire" requirement of MCL 418.131(1)(l) is met. At page 29 of his brief, discussing *Higgins v Monroe Evening News,* 404 Mich 1; 272 NW2d 537 (1978), Plaintiff states that *Higgins* deals only with "whether a contract for hire existed, which is not at issue here." Thus, Plaintiff here concedes that he does meet the requirements of MCL 418.131(1)(l).

At page 29, Plaintiff insists the question is whether he meets the exclusion of subsection (n), which would be relevant only if he first met the contract of hire requirement in subsection (l). But at page 32, Plaintiff also admits that "here, Ricky Reed did not provide, maintain or render his own delivery service to either Mr. Food or the general public" (Plaintiff's emphasis).

C. The Test Is Objective, Not Subjective.

Although Plaintiff at one point says that there is no issue of "contract of hire," some of his argument seems to contradict that concession.

Much of Plaintiff's argument is based on what Plaintiff argues is the "actual" (*i.e.,* subjective) intent of the parties. Thus, Plaintiff says at page 26 that "Herskovitz had no intention of ever employing Plaintiff again." As is noted above, Plaintiff's own testimony and that of Buddy Hadley contradicts this, but the more fundamental point is that the parties' subjective thoughts do not matter. Whatever rule is ultimately adopted for the definition of an employee, it cannot be a subjective one, in which the parties are asked whether they were thinking of an employment or an independent contractor relationship.

Also, at pages 26-27, Plaintiff argues that "[a] contract of employment cannot arise against the will or without the consent of an alleged party thereto . . .." This argument contemplates a far more formal exchange of words than is present in most employment relationships. It imposes on laypersons the kind of detail that would be expected from lawyers

negotiating a formal written contract on behalf of their clients. The rule must be one that works in the real world of ordinary people making agreements in the ordinary way.

At page 30, Plaintiff continues the subjective analysis when he says "absolutely no one considered Mr. Reed to be receiving wages as an employee of Mr. Food at the time of his injury." Again, the nature of the relationship cannot be determined by asking the two parties whether they "considered" that the cash was "wages" or something else.

Plaintiff supports his subjective analysis by quoting certain phrases from *Hoste v Shanty Creek,* 459 Mich 561; 591 NW2d 360 (1999), including: "compensation must be payment intended as wages . . .." But *Hoste* used this language to explain the purpose of the objective test in which the court evaluates the nature of the of compensation, not the parties' opinions about it. In *Hoste*, the entire analysis focused on the nature of what the plaintiff received (lift tickets and discounts). Nowhere in the opinion is there a reference to what either plaintiff or defendant said about the lift tickets and discounts. The critical difference between *Hoste* and this case is the existence of a bargained exchange of cash for labor. In *Hoste*, the ski patrolman received nothing that had transferable value, *i.e.,* value outside the confines of the ski area itself.

Plaintiff also refers to the phrase in *Hoste* "real, palpable and substantial consideration," and argues that the amounts Plaintiff received, if spread over a number of months, is then de minimis. There are at least five things wrong with this. **First**, it is an artificial construct. Plaintiff was paid something near minimum wage each day he worked, and to reduce that by including days he did not work is artificial. **Second**, any dollar amount test is itself artificial as a matter of legal theory and public policy. The Worker Compensation Bureau's benefits chart starts at $1 per week, so it contemplates situations were the actual wages are low. **Third**, the rule would not work in simple practical terms. Whatever dollar amount is chosen would have to

be updated for inflation. That is the kind of rule the legislature makes, and it will not work as a judicial enactment. **Fourth**, the result would be that workers at the lower end of the wage scale would be disqualified from benefits. **Fifth**, to the extent this argument is based on words extracted from *Hoste*, it misinterprets the *Hoste* analysis, as is explained above.

II. PLAINTIFF WAS NOT AN INDEPENDENT CONTRACTOR.

Although Plaintiff concedes that he did not provide delivery services to Defendants or to the general public, he claims that he was nonetheless an independent contractor.

A. The Services at Issue Are Delivery Services.

Plaintiff argues strenuously at page 31 that it is wrong to characterize Plaintiff's services as delivery services and that instead Plaintiff's work should be characterized as "general labor" (brief p 31). This is incorrect, but the result would be the same under either definition.

The argument is incorrect because the statute, in subsection (l), defines an independent contractor as "every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service . . .." The word "this" is a demonstrative adjective, which links the term "this service" to the antecedent phrase "performing service." The service that Plaintiff was performing was the delivery of Mr. Food's products to Mr. Food's customers. Plaintiff was not selling products; he was delivering them. The question under subsection (l) is whether he "maintain[ed] a separate business" "in relation to this [*i.e.,* delivery] service," or at least "[held] himself out to and rendered[ed]" "this service" "to the public."

The evidence is uncontroverted and Plaintiff agrees that he did not hold himself out to the public as a provider of delivery services. Therefore, he is not an independent contractor.

B. The Result Is the Same If the Services Are General Labor.

Though Plaintiff candidly admits, at page 32, that "here, Ricky Reed did not provide, maintain or render his own delivery service to either Mr. Food or the general public" (emphasis by Plaintiff), he distinguishes between delivery services in particular, and "general labor."

The result is the same. The evidence was that Plaintiff did some work for Mr. Food and some unknown quantity of painting for some relatives. Even if we assume that the painting also qualifies as "general labor," there is still no evidence that Plaintiff "maintain[ed] a separate business" of general labor, or that he "[held] himself . . . out to and render[ed] [general labor] service to the public."

The facts are simple. Plaintiff lived with his aunt. When Buddy Hadley came to get him, he helped deliver products. Apart from that, he did some painting for relatives. Plaintiff offered no evidence of any "holding out," even of general labor. "Holding out" requires some kind of activity on the part of the contractor. It may be advertising or fliers or word of mouth, but it must be something more than waiting to be asked. It is a simple distinction between actively offering to do work and passively waiting for and then accepting someone else's offer.

Even further removed is the requirement of "maintaining a business" as a general laborer. Plaintiff displayed none of the accoutrements of a business, such as cards, equipment, records, or a billing system with tax records.

It would perhaps go too far to hold, as a matter of law, that one person can **never** be in business as a general laborer providing unskilled labor, but it would be a serious error to hold that someone who waits passively to be asked if he wants to work is somehow an independent contractor of "general labor."

A case that Plaintiff relies on, *McKissic v Bodine,* 42 Mich App 203; 201 NW2d 333 (1972), illustrates this point well. Plaintiff describes *McKissic* as being a near perfect description of the relationship of Mr. Reed to Mr. Food: "A better description or Ricky Reed's occupational status would indeed be hard to find" (Plaintiff's brief p 25). These are the facts of *McKissic:*

1. McKissic had a full-time job at a factory.
   Plaintiff had no similar full time job.

2. McKissic advertised as a handyman.
   Plaintiff did not advertise.

3. McKissic painted "McKissic Contracting" on the side of his truck.
   Plaintiff had no truck.

4. McKissic furnished his own materials.
   Plaintiff's delivery work required no materials; who bought the paint is unknown.

5. McKissic engaged his own helpers.
   Plaintiff was the helper.

6. McKissic worked at such times as he would be available.
   Plaintiff worked when Hadley asked.

7. When McKissic did work for Bodine, "[e]ach job was carried out as a separate contract."
   There were no negotiations between Mr. Food and Mr. Reed.

8. McKissic "either bid or [was] told by [defendant] what he would be willing to pay."
   Plaintiff received $35 or $40, depending on the day.

9. McKissic "retained the option of accepting or rejecting the offer."
   Presumably Reed had that option, but no evidence suggests he exercised it.

McKissic, 42 Mich App at 204-205.

Again, the distinction is a simple one, between someone who is merely willing to work when asked and someone who is seeking work.

III. THE EMPLOYMENT ISSUE WAS NOT WAIVED.

Plaintiff also argues that Defendant waived the issue of the exclusive remedy by not asking for jury instructions.

The short answer is that as this Court has observed, the existence of an employment relationship goes to the subject matter jurisdiction of the court and cannot be waived. *Harris v Vernier,* 242 Mich App 306; 617 NW2d 764 (2000).

Apart from that, Plaintiff's argument misconstrues the events. Defendant's position at trial was that Plaintiff was an employee as a matter of law. From Defendant's perspective, no jury instructions were necessary. In the trial court, Plaintiff also appears to have thought it was a question of law, because he did not ask for instructions. But if Plaintiff believed in the trial court that it presented an issue of fact, it was for him to ask for jury instructions.

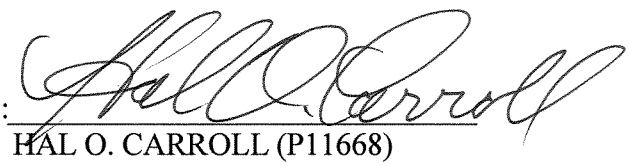
In addition, when this Court remanded the case to the trial court for findings of fact, it allowed the trial court to reopen proofs at the trial court's discretion. If Plaintiff then believed that further facts needed to be presented, he had the opportunity to do so by motion.

RELIEF REQUESTED

Defendants-Appellants request that this Court reverse the opinion of the Court of Appeals and remand this case to the trial court with instructions to dismiss the claim against Defendants-Appellants with prejudice.

Respectfully submitted,

VANDEVEER GARZIA, P.C.

By: 

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